AUG 16 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-129

TAUB, HUMMEL & SCHNALL, INC.

Petitioner,

-against-

I. C. HERMAN & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion dated May 28, 1974, of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 28, 1974.

OPINIONS BELOW

The Second Circuit's majority and minority opinions in this proceeding were rendered on May 28, 1974, but are not yet reported. They are reproduced in Appendix I.

The opinion and order of the United States District Court for the Southern District of New York, Cannella, John M., D.J., dated and entered June 11, 1973, not yet reported; reproduced in Appendix II.

Findings of Fact, Conclusions of Law and order of Referee in Bankruptcy E. J. Ryan filed April 19, 1973; reproduced in Appendix III.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 28, 1974. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Whether a payment by a customs broker of United States customs duties due from an importer, while the importer is solvent, entitles the broker in the importer's subsequent Chapter XI proceeding to the priority to which the government would be admittedly entitled for debts due the government?

2. In enacting 31 U.S.C. 193 did Congress intend to follow the maxim "*expressio unius est exclusio alterius*" so as to preclude subrogation in all other instances?

3. Does not the crucial role and extensive duties of a customs broker in effecting the rapid entry of imports require the application of equitable principles so as to entitle the broker to be subrogated to the priority to which the United States is admittedly entitled in the importer's subsequent Chapter XI proceedings and to prevent unjust enrichment?

4. May a corporate customs broker become a surety on a customs bond or are such customs brokers precluded from doing so by customs regulations and/or Treasury decisions which prohibit sureties on such bonds from engaging in any other business?

5. Can it be said that the payment of the customs duties with the entry by the petitioner-broker was officious so as to preclude subrogation to the priority rights of the United States or was the implied agreement for subrogation sufficient to prevent the broker from being deemed a volunteer?

Commercial Standard Ins. Co. v. American Emp. Ins. Co., 209 F.2d 60.

Ragan v. Kelly, 180 Md. 324, 24 A.2d 289.

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STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 193. - Priority of Sureties.

Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

11 U.S.C.A. 104(a) - Debts Which Have Priority.

The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary and expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more

creditors, the reasonable costs and expenses of such recovery; the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of Title 18, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition, filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the reasonable disbursements made by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount as the court may allow. Where an order is entered in a proceeding under any chapter of this title directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding, including expenses necessarily incurred by a debtor in possession, receiver, or trustee in preparing the schedule and statement required to be filed by section 638, 778, or 883 of this title, shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before

the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling, or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; (3) where the confirmation of an arrangement or wage earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under chapter 9 of Title 18, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes which become legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy: *Provided, however,* That no priority over general unsecured claims shall pertain to taxes not included in the foregoing priority: *And provided further,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; and (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled

to priority, and rent owing to a landlord who is entitled to priority by applicable State law or who is entitled to priority by paragraph (2) of subdivision c of Section 107 of this title: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

STATEMENT OF THE CASE

We are concerned here with the protection of customs brokers whose existence and performance are necessary to the U. S. Customs Service and to the collection of some four billion dollars in annual customs revenue. There are over three thousand brokers throughout the United States. To survive the broker needs and wants equal and fair treatment to recover all duties expended by him in behalf of the importer as is afforded the United States government and surety companies.

Such duties are advanced by brokers because this has been and is the custom and practice in the industry, and because they expected and believed they had protection as quasi-government licensed agents and would therefore step into the shoes of the United States government.

The decision of the Court of Appeals in denying subrogation to the broker to which he is entitled under general equitable principles long established threatens the broker's existence, results in unjust enrichment to creditors of the importer in bankruptcy, and as a consequence has thrown the entire industry into turmoil. Calls are coming in almost daily from individuals and organizations who are affected and who support this application.

The National Customs Brokers & Forwarders Association of America, Inc. has expressed its concern because its members are alarmed by the decision of the Court of Appeals which failed to recognize the custom in the industry and the quasi-government function of the broker.

The Court of Appeals was wrong in applying 31 U.S.C. 193 which has no application since it covers subrogation of surety companies on customs bonds.

The Court of Appeals was wrong in declaring that a corporate broker could protect itself simply by becoming surety on the bond. Customs Regulations and Treasury Decisions specifically prohibit same.

There was a split decision in the Court of Appeals. Judge Friendly wrote a lengthy and vigorous dissenting opinion.

Other jurists have also disagreed. In this case Referee Ryan agrees with the Court of Appeals. In a similar case Referee Babitt agrees with Judge Friendly's position. See *Matter of Fastline, Inc.* in Appendix VI hereto.

Referee Babitt reached the conclusion that a broker in the position of the petitioner was entitled to prevail under general equitable principles and was accorded priority as to duties paid to the government. He concluded further that equitable principles govern the exercise of bankruptcy jurisdiction. He stated that it was unnecessary to consider 31 U.S.C. 193 which was inapplicable.

The facts are set out in the majority and dissenting opinions of the Second Circuit.

Appendix I, pp. 1a-9a, infra.

REASONS FOR GRANTING WRIT

There is presented to this Court a novel and important Federal question not heretofore reviewed. Such question deals with the free flow of goods in international trade, the collection of customs revenues which exceed four billion dollars annually, the rights of customs brokers throughout the United States and the entry of millions of tons of cargo into our country. Customs brokers act in a quasi-governmental capacity both on behalf of importers and as an adjunct to the customs service and are indispensable to the administration of customs laws and regulations.

This was confirmed by the Supreme Court of the United States in *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 204-5 (1944) when it said that the skill and responsibility of customs brokers is needed to protect importers as well as the Treasury. However, in the performance of their valuable duties what protection do brokers have who advance their funds to accomplish entry of goods on arrival? The entire industry, the Customs Service, brokers and importers alike, are awaiting the outcome of this case.

It is immediately urgent that this Court recognize the need for review and the general importance of the question presented.

Such question deserves the consideration of this Court because:

1. This case presents for the first time a novel Federal question. The Circuit Court was divided. There is a strong dissenting opinion by Judge Friendly. There

are directly opposite decisions by two estimable and erudite officers of the Court below, Referee Ryan in this case, and Referee Babitt in the *Fastline* matter.

In *Fastline* Referee Babitt grants subrogation based on general equitable principles following this Court's decision in *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). He distinguished the *Saunders* case where the broker was the named consignee.

> *In Re Fastline, Inc.*, No. 65-B-872 (S.D.N.Y. Feb. 14, 1967) (Babitt, Referee in Bankruptcy)
>
> *R. J. Saunders & Co. Inc. v. Vincent*, 309 F.2d 65 (2 Cir. 1962)

2. It has far-reaching effect on the Treasury Department which depends on the over three thousand customs brokers for the collection of customs revenues, and the entry of millions of tons of cargo into our country.

3. The decision below does violence to the general equitable principles which apply to bankruptcy cases as enunciated by this Court in *Bank of Marin v. England*, 385 U.S. 99, 103 (1966).

4. It affects the public policy of the United States, and the administration of the bankruptcy and customs laws.

5. The decision below relies entirely on 31 U.S.C. 193 which is clearly inapposite. It applies solely to the right of subrogation granted to a surety on a bond in an insolvency situation. Clearly not our case.

6. The decision below places an undue burden on the prompt collection of customs duties and the expeditious entry of goods.

The function of the customs broker is described by the former president of their association, Leonard M. Shayne, in his testimony before the United States Senate. We quote:

> "Unfortunately, the role of the customs broker in connection with the clearance of merchandise through customs, is not well understood. Supposedly, he is the man who is given a set of documents, effects customs clearance, lodges a permit at the dock, invoices his client for his services--and with this action completes his services in respect to said shipment. But his task is not nearly so simple.
>
> The customs broker is a highly trained professional with versatile talents. He must be thoroughly experienced, and familiar with the various aspects of the import duties and regulations in order to be of maximum value to his client, the importer. Licensed by the Treasury Department after a careful investigation of his background and experience, and upon completion of an examination and review by a Board of Examiners, the customs broker must not only possess a complete knowledge of the Tariff Schedules

> and the Customs Regulations, but he must keep abreast of the numerous amendments through changes in the law and administrative regulations. Well versed in determining proper classification and dutiable value, he must know when charges affecting shipment are dutiable or non-dutiable. He must be fully aware of the various commodities subject to quotas * * *."
>
> * * *
>
> In short, the customs broker * * * is the coordinator, arranger, and manager of all the myriad of complex activities that are needed to make possible the movement of cargo in international commerce."

The crucial role played by the customs broker is further outlined in the dissenting opinion of Judge Friendly where he quotes the language of Justice Frankfurter in *Union Brokerage v. Jensen*, 322 U.S. 202, 204-05 (1944) at page 204 as follows:

> "Speed in making entry is vital, because goods cannot proceed to their ultimate destination until its completion. Apart from the fact that importers cannot always or even often make entries in person, the procedure makes demands upon skill and experience. The specialist in these services is the customhouse broker. In addition, he advances the duty in order that the goods may be cleared

> 19 U.S.C. § 1505. The competence of the broker also bears on the efficient collection of customs duties in that the likelihood of additional assessment or refund after final determination of the duty is greatly lessened by accuracy in the tentative computation."

The surety bond which is a focal point in the case is required not for the payment of the duties by the broker to effect immediate release of the goods by customs, as suggested by the majority opinion, but is prescribed fundamentally for the protection of the United States when the ultimate determination as to customs duties is made sometimes long *after* entry. Such bond is required for many other purposes not related to payment of duties. Consider footnote 4 of the opinion of Judge Friendly:

> "I am not at all clear that, as the majority suggest, a customs broker can protect itself in the situation here presented by the simple expedient of becoming a 'surety on the importer's customs duty bond.' Apart from the facts that customs brokers may not wish to assume such a continuing contingent liability and would doubtless demand compensation for doing so, I read 19 C.F.R. § 8.28 (b) as requiring deposit of the estimated duties even when a bond has been filed. When, as here, the issue concerns the estimated duties already paid rather than

> liability under the bond, I fail to see what significance there would be in the customs broker's having gone surety on the latter."

The general practice followed by all brokers is to effect the immediate entry of goods to avoid congestion at the points of entry, to meet the deadline for demurrage charges, as well as customs, to pay the duties subject to final determination of customs duties after entry.

As a result of the decision by the Circuit Court, the entire practice for the expeditious clearance of customs and the entry of goods has been put in jeopardy because the protection to which brokers should be entitled when they effect immediate entry and advance their funds has been removed and destroyed by the denial to them of subrogation to the priority of the United States. They cannot afford the losses which can run into the millions for the nominal brokerage they receive on each entry. The implication of this decision is clear and the general public interest dictates intervention by this Court.

It is therefore of the utmost importance that this Court settle the question of whether 31 U.S.C. 193 enacted as long ago as 1799 and prior to the Bankruptcy Act controls in the type of bankruptcy situation presented in this case or is inapposite and the Court below should have applied general equitable principles. This Court declared in *Bank of Marin v. England*, 385 U.S. 99, 103 (1966):

> "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."

The decision of the lower Court if allowed to stand will do violence to the doctrine of equitable subrogation and further complicate an industry which is already filled with a myriad of complex activities that are needed to make possible the movement of cargo.

See:

"The Customs Broker" by Leonard M. Shayne appearing in "Customs Today" Fall, 1973, Published by the U. S. Customs Service Treasury Department. Reproduced in Appendix.

"A Progress Report" published by Department of Treasury, United States Customs Service, Washington, D. C. (1974)

Testimony of Leonard M. Shayne, (June 24, 1970) in behalf of National Customs Brokers & Forwarders Association of America, Inc.) U. S. Senate Select Committee on Small Business.

Moreover public policy favors prompt payment to the United States of customs duties. This is exactly the function performed by the broker. Payments favored by public policy cannot be deemed officious. *Matter of Farmers & Merchants State Bank of Nooksack*, 175 Wash. 78, 26 P. 2d 631.

Consider the general situation that prevails with regard to almost all imports:

Goods arrive at a port of entry:

The immediate problem at such time is to have entry made by a broker to get the goods moving away from the pier on to their ultimate destination. If anything is done at this stage to hamper such flow it will have effects such as:

1. The goods will have to remain on the dock.

2. Further cargo deliveries will be backed up. Ships will have to sit in the harbor with their cargos.

3. Goods can spoil or be subject to pilferage.

4. The United States will not collect its duties timely and expeditiously. Penalties for demurrage and late customs entry are imposed.

See:

Document entitled "REGION II INFORMATION PIPELINE NO. 28" dated August 4, 1972, Treasury Department, Bureau of Customs, New York, N. Y.
Reproduced in Appendix hereto.

5. Prices may rise as ultimately the consumer will bear the burden of additional costs.

6. An entire economy will be strained.

The key to preventing these serious problems is the customs broker. It is he with his vast knowledge and experience who sees to it that bills and duties are paid as required and that the goods may move on to their ultimate destination.

Equity dictates that the customs broker should be subrogated to the priority of the United States for advancing duties. As Judge Friendly stated in his dissenting opinion at page 3704:

> " * * * To allow priority here in the interest of facilitating the process of importation and the collection of import duties therefore would not be, as the majority insist, to alter 'the strict priority provisions of § 64 of the Bankruptcy Act,' but simply to permit subrogation to an admitted priority of the United States. * * *"

It is inconceivable that this Court can permit the entire economy of our country to be disrupted by a decision:

a. based upon a Federal statute which by its very language does not apply to this type of situation;

b. which does violence to the general equitable principles that this Court declared should be applied to bankruptcy jurisdiction.

The position of the appellate court is predicated in part upon the erroneous assumption that a customs broker can obtain

priority by going surety on the bond. Treasury Decisions and Customs Regulations prohibit a corporate broker from becoming a surety. Under Customs Regulations, even surety companies, other than customs brokers, cannot act as surety on a customs bond unless included in an approved list published by The Customs Service.

See:

Customs Regulations of the United States, published by Treasury Department, Bureau of Customs (4th Rev. July 1969):

> "25.12 *Corporate sureties.*--(a) A list of corporations authorized to act as sureties on bonds, with the amount in which each may be accepted, will be furnished annually to all collectors of customs by the Secretary of the Treasury. *No corporation shall be accepted as a surety on a bond unless named in the current list* * * *." (Emphasis ours)

Under Treasury Decisions companies engaged in the business of surety on customs bonds cannot engage in any other business such as customs brokerage.

In Treasury Decision 39195 Treasury Department July 5, 1922, entitled "Regulations applicable to surety companies doing business with the United States under act of August 13, 1894, as amended by act of March 23, 1910" speaking of companies permitted to write customs bonds it says in paragraph "5":

> "5. *Business.*-Such company must engage in the business of fidelity insurance and surety-

> ship, whether or not also making contracts of insurance in one or more of the classes generally known as casualty risks, *but shall not be engaged in any other classes of insurance or any other business.* It must be the intention of every such company to engage actively in the execution of fidelity and surety bonds running to the United States." (Emphasis ours)

It is of tremendous public importance that this Court grant certiorari. As Judge Friendly declared, the majority took "an unduly narrow approach to the rights of customs brokers * * * the issue here is of importance to the effective administration of the customs laws * * *."

CONCLUSION

FOR THESE VARIOUS REASONS THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York City
August 9, 1974

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 556—September Term, 1973.

(Argued February 19, 1974 Decided May 28, 1974.)

Docket No. 73-2042

IN THE MATTER OF I. C. HERMAN & CO., INC.,

Debtor-Appellee,

v.

TAUB, HUMMEL & SCHNALL, INC.,

Claimant-Appellant.

Before:

LUMBARD, FRIENDLY and TIMBERS,

Circuit Judges.

Appeal from an order entered in a Chapter XI proceeding in the Southern District of New York, John M. Cannella, *District Judge*, affirming an order of a referee in bankruptcy which had reclassified as a general unsecured claim a customs broker's claim for customs duties which it had paid voluntarily on behalf of the debtor importer.

Affirmed.

HOWARD KARASIK, New York, N.Y. (Sherman & Citron, New York, N.Y., on the brief), *for Debtor-Appellee.*

ALBERT ADAMS, New York, N.Y. (Ferris, Adams & Creidy, New York, N.Y., on the brief), *for Claimant-Appellant.*

TIMBERS, *Circuit Judge:*

On this appeal from an order entered in a Chapter XI proceeding in the Southern District of New York, John M. Cannella, *District Judge,* the sole question is whether voluntary payment by a customs broker of United States custom duties due from an importer entitles the broker in the importer's Chapter XI proceeding to the priority to which the government would be entitled for debts due the government. The district court and the bankruptcy referee answered the question in the negative. We affirm.

Appellant Taub, Hummel & Schnall, Inc. (Taub) is a customs broker. Appellee I. C. Herman & Co., Inc. (Herman) is an importer of goods from abroad. Taub acted as customs broker for Herman. The goods without exception were imported in Herman's name.

A bond in amount of $50,000 was executed by Herman as principal pursuant to which Herman agreed to pay to the government customs duties on its imported goods. Taub did not execute this or any other bond, either as principal or surety, for the payment of Herman's customs duties.[1]

During the period from March 3, 1972 through April 7, 1972, Taub voluntarily and without obligation advanced the sum of $32,048.45 in payment of Herman's customs duties due on Herman's imports.

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1 In an affidavit submitted in support of Taub's priority claim in the instant proceeding, its president stated:

"It is clear therefore, that the broker, my corporation, Taub, Hummel and Schnall, Inc. was at no time obligated to pay any part of the debtor's duties to the United States government."

On April 6, Herman filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act. 11 U.S.C. §§701 et seq. (1970). In due course, Taub filed in the Chapter XI proceeding a claim for $46,779.54. Of this total claim, Taub classified as a priority claim the $32,048.45 of Herman's customs duties which it had paid to the government.[2] Upon application to the bankruptcy referee, Herman obtained an order reclassifying Taub's $32,048.45 priority claim as a general unsecured claim.

On Taub's petition to review, the district court affirmed the referee's reclassification of Taub's claim as a general unsecured claim and held that it was not entitled to priority status.

Taub argues that, as a result of discharging Herman's obligations to the government arising from the assessment of import duties, it is entitled to the priority to which the United States would be entitled for debts due the government. Taub's priority claim in essence is based on principles of subrogation. Having paid customs duties due from Herman to the United States, Taub says that it is entitled to succeed to the government's rights against Herman, including the government's priority claim in bankruptcy proceedings for unpaid customs duties.

Priority by subrogation, however, has been granted only in the limited situation provided for in 31 U.S.C. §193 (1970):

> "Whenever the principal in any bond given to the United States is insolvent . . . , and . . . any surety on

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2 The $14,731.09 difference between Taub's total claim of $46,779.54 and its asserted priority claim of $32,048.45 represented certain importing charges, other than customs duties, which Taub had advanced on behalf of Herman.

Of the $32,048.45 in customs duties claimed to have been paid by Taub on behalf of Herman prior to the latter's filing of its Chapter XI petition, apparently $128.11 was paid on April 7, the day after the petition was filed.

> the bond . . . pays to the United States the money due upon such bond, such surety . . . shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent . . . as is secured to the United States. . . ."

In view of this statutory provision, the question before us is whether the fact that Taub was not a surety on the bond executed by Herman for the payment of customs duties forecloses Taub's priority claim.

We hold, as did the district court and the bankruptcy referee below, that the rationale of our decision in *R. J. Saunders & Co., Inc.* v. *Vincent*, 309 F.2d 65 (2 Cir. 1962), *aff'g* 202 F.Supp. 140 (S.D.N.Y. 1962), requires that Taub's claim be treated as a general unsecured claim without priority status. In *Saunders*, a customs broker, in order to expedite entry of imports, see *Union Brokerage Company* v. *Jensen*, 322 U.S. 202, 204 (1944), had paid customs duties due from the bankrupt importer. We rejected the contention of the customs broker that it was entitled to succeed to the rights of the United States against the bankrupt, including the government's right to have its claim accorded priority status in the distribution of the bankrupt's estate. And we pointed out that "Congress has allowed subrogated priority in only one situation—that in which a surety on a bond given to the United States discharges the debt on behalf of his principal." 309 F.2d at 67.[3]

We recognize that *Saunders* differs from the instant case in certain respects. There, unlike here, the customs broker was the nominal consignee and the importer of record; and the broker also was the principal on the bond furnished to the government. Since the broker did not stand as surety

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3 The "one situation" is 31 U.S.C. §193 (1970), referred to above. As Judge Clark pointed out in *Saunders*, this statute has been in force since 1799 without amendment. 1 Stat. 676 (1799).

for the importer, however, we refused in *Saunders* to extend the statute by implication to accord priority to the broker's claim. Likewise here we decline Taub's invitation to extend Section 193 to accord its claim subrogated priority status, thus altering the strict priority provisions of Section 64 of the Bankruptcy Act, 11 U.S.C. §104 (1970). See *In Re Chicago Express, Inc.*, 332 F.2d 276, 278-79 (2 Cir.), *cert. denied*, 379 U.S. 879 (1964).

Finally, we reject as a non sequitur Taub's argument that a holding in the instant case affirming its classification as a general unsecured creditor, read in conjunction with the *Saunders* holding that subrogated priority is not available when the broker is the nominal consignee and importer of record, means that there is no conceivable situation in which a broker can achieve priority status by paying the customs duties owed by an importer. The short answer to this is that all a customs broker need do to gain priority is to go surety on the importer's customs duty bond.

Affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

Believing that the majority has taken an unduly narrow approach to the rights of customs brokers whose clients have become insolvent and that the issue here is of importance to the effective administration of the customs laws, I respectfully dissent.

I do not read the limited grant of subrogation in 31 U.S.C. § 193, on which Taub concededly cannot rely, as precluding its having that remedy here. Although I am not at all sure I agree with *R. J. Saunders & Co.* v. *Vincent*, 309 F.2d 65 (2 Cir. 1962), so heavily relied on by the majority, the case is clearly inapposite. There the account between the customs broker and the importer was

in balance at the time of the bankruptcy, and sums earlier advanced like those here at issue were not involved. The United States made additional assessments thereafter, which the broker paid because, as nominal consignee and importer of record, it had filed a bond in which it was designated as principal and a corporate surety as surety. This court held only that since the broker had made itself rather than the bankrupt the primary obligor, it "was discharging its own debt," 309 F.2d at 67.[1] Judge Clark said that while the court did not "feel bound by the maxim '*expressio unius est exclusio alterius*,'" 309 F.2d at 68, it could not extend a statute allowing subrogation by a surety against an insolvent principal to cover the case of a solvent principal seeking subrogation against an insolvent who was not a party to the bond at all. This, and only this, was decided.

Moreover, so far as the instant case is concerned, we need not even reach the question whether § 193 has implicitly exclusive effect in cases within its general ambit, since that section applies only when the primary debtor is "insolvent" at the time the debt is paid by the party seeking subrogation. On the facts before us, in contrast to those in *Saunders*, Taub had paid almost all the sums in issue to the Government before the Chapter XI petition was filed.[2] See *In re Fastline, Inc.*, No. 65-B-872 (S.D.N.Y. Feb. 14, 1967) (Babitt, Referee in Bankruptcy). Surely the majority would not contend that this statute implicitly forbids subrogation by a surety who has discharged a principal's obligation to the United States prior to the

1 It was fairly disputed whether the importer remained liable at all, see 309 F.2d at 67, although the court assumed this *arguendo*.

2 There is no evidence that Herman was insolvent when Taub advanced the duties, except for the $128.11 paid by Taub on April 7, see note 2 to the majority opinion.

principal's insolvency simply because the statute does not grant that right. If the statute does not preclude subrogation in that case, it does not do so here.

The Supreme Court has instructed that in bankruptcy proceedings courts are not to read "statutory words with the ease of a computer," since "[t]here is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." See *Bank of Marin* v. *England*, 385 U.S. 99, 103 (1966), a decision whose approach is not without some bearing here, and 1 Collier, Bankruptcy ¶ 2.09 (1974), citing innumerable cases. Under general equitable principles, Taub should be allowed subrogation to the Government's priority in Herman would have been "unjustly enriched by the retention of the benefit . . . conferred" when Taub paid the duties. Restatement of Restitution § 162 (1937). Under such principles, it is not necessary that Taub should have been a surety on the customs duties bond executed by Herman, *id.*, Reporters' Notes on § 162, at 199, provided only that its payment of the duties was not "officious." *Id.* § 162, Comment *b*; *cf. id.* § 2. Although the most common cases for allowing subrogation for discharge of an obligation other than by a surety are payments induced by fraud or mistake or payments effected by the debtor's wrongful use of another's property, *see, e.g., In re Ennis*, 187 F. 720 (2 Cir. 1911), *app. dismissed sub nom. Bamford* v. *Russell*, 226 U.S. 623 (1912), it cannot be reasonably said, in light of the crucial role and extensive duties of a customs broker in effecting the rapid entry of imports, so well described in *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 204-05 (1944),[3] that

---

3 The Court there said:

> Speed in making entry is vital, because goods cannot proceed to their ultimate destination until its completion. Apart from the fact that importers cannot always or even often make entries in person, the procedure makes demands upon skill and experience. The spe-

Taub's payment here was "officious" and that Herman therefore would not have been "unjustly" enriched by retention of the benefit thereby conferred. While it is true that if the broker had not made the payments but had required the debtor to do so, the debtor's assets would have been depleted and creditors might not have extended credit, it is equally true that if the broker had left the goods on the dock subject to the Government's lien, creditors would doubtless have been none the wiser. Taub paid the duties to enable Herman to conduct its business, in Herman's interest and presumably in that of its creditors. To allow priority here in the interest of facilitating the process of importation and the collection of import duties therefore would not be, as the majority insist, to alter "the strict priority provisions of § 64 of the Bankruptcy Act," but simply to permit subrogation to an admitted priority of the United States.[4] The purpose of 31 U.S.C. § 193, enacted long before there was a bankruptcy act, was to bestow priority on a surety against an insolvent principal in the case there defined, not to limit the application of equitable principles in proceedings under

---

cialist in these services is the customhouse broker. In addition, he advances the duty in order that the goods may be cleared. 19 U.S.C. § 1505. The competence of the broker also bears on the efficient collection of customs duties in that the likelihood of additional assessment or refund after final determination of the duty is greatly lessened by accuracy in the tentative computation.

322 U.S. at 204.

4 I am not at all clear that, as the majority suggest, a customs broker can protect itself in the situation here presented by the simple expedient of becoming a "surety on the importer's customs duty bond." Apart from the facts that customs brokers may not wish to assume such a continuing contingent liability and would doubtless demand compensation for doing so, I read 19 C.F.R. § 8.28(b) as requiring deposit of the estimated duties even when a bond has been filed. When, as here, the issue concerns the estimated duties already paid rather than liability under the bond, I fail to see what significance there would be in the customs broker's having gone surety on the latter.

the Bankruptcy Act. Taub clearly was not "discharging its own debt," 309 F.2d at 67.

I would reverse the judgment of the district court and the order of the referee.

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APPENDIX II

THE OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, CANNELLA, JOHN M., D.J., DATED AND ENTERED JUNE 11, 1973, NOT YET REPORTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

I. C. HERMAN & CO., INC., No. 72 B 373

Debtor.

MEMORANDUM

CANNELLA, J.

The findings of fact and conclusions of law made by Edward J. Ryan, Referee, and the order entered thereon dated April 19, 1973 which re-classified the claim of Taub, Hummel & Schnall, Inc., as a general claim are affirmed.

The essential facts in this matter are not in dispute. As indicated by the Referee, the debtor was an importer of certain goods into the United States and claimant, Taub, Hummel & Schnall, Inc., acted as customs broker. A bond in the amount of $50,000 was executed by the debtor, as principal, to the government pursuant to which the debtor agreed to pay customs duties to the government on its imported goods. It is clear that the claimant did not act as a principal or surety on this bond or on any other bond executed by the debtor with respect to the payment of customs duties.

The claimant voluntarily and without obliga-tion advanced the sum of $32,048.45 for payment of the debtor's customs duties to the government. The debtor subsequently filed its Chapter XI petition. The claimant contends that it is entitled to be subrogated for the amount of the duties to the claim of the government and is therefore deserving of priority.

The leading case on this subject which is cited by both parties in their briefs is the Second Circuit Court of Appeals decision in R. J. Saunders & Co. v. Vincent, 309 F.2d 65 (2d Cir. 1962). In Saunders, the court held that a nominal consignee by furnishing a bond to expedite entry of goods undertook liability for the import duties which it paid. The consignee could have escaped liability by designating the true owner and having it post bond. Since the government received payment from a primary obligor, the claim for subrogation was denied.

More pertinent to the issues presented on this petition, however, the Saunders court went on to state: "Congress has allowed subrogated priority in only one situation-that in which a surety on a bond given to the United States discharges the debt on behalf of his principle". 309 F.2d at 67. See 31 U.S.C. §193. As the above recited facts demonstrate, the claimant is not a surety nor was it legally obligated to make the payment.

In view of the foregoing, the order

denying priority status is affirmed.[1/]

So ordered.

Dated: New York, N. Y.
June 11, 1973

U.S.D.J.

1/ The court is not persuaded that the slightly more than two month delay encountered by the Referee in filing his findings thereby renders his decision a nullity.

APPENDIX III

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF REFEREE IN BANKRUPTCY, E. J. RYAN FILED APRIL 19, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE] No. 72 B 373

The Debtor having moved for an order reclassifying Claim No. 143 filed by TAUB, HUMMEL & SCHNALL, INC. in the sum of $46,779.54;

NOW, upon reading and filing the application of the Debtor dated January 3, 1973, the Memorandum of Law submitted in support of the application, and the affidavit of Roland R. Hummel, Jr. the President of TAUB, HUMMEL & SCHNALL, INC., and Memoranda of Law in opposition thereto, and upon all the facts adduced, the following Findings of Fact and Conclusions of Law are made:

FINDINGS OF FACT

1. TAUB, HUMMEL & SCHNALL, INC. is a customs broker.

2. Debtor imported certain goods into the United States in connection with which TAUB, HUMMEL & SCHNALL, INC. acted as customs broker.

3. Debtor executed a $50,000.00 bond as principal to the United States Government agreeing, inter alia, to pay customs duty to the United States Government in connection with goods imported by Debtor.

4. TAUB, HUMMEL & SCHNALL, INC. did not act as principal or surety on the aforesaid bond or on any other bond executed by Debror in connection with the payment of custom duties.

5. TAUB, HUMMEL & SCHNALL, INC. advanced the sum of $32,048.45 in payment of customs duties to the United States Government in connection with the Debtor's aforesaid imports.

6. TAUB, HUMMEL & SCHNALL, INC. did not have any obligation to pay the aforesaid duty, and did so voluntarily.

7. TAUB, HUMMEL & SCHNALL, INC. filed in the within proceedings Claim No. 143 in the sum of $46,779.54, limiting its priority claim, however, to the sum of $32,048.45.

CONCLUSIONS OF LAW

1. TAUB, HUMMEL & SCHNALL, INC. is a general creditor of the Debtor in the total sum of $46,779.54.

2. TAUB, HUMMEL & SCHNALL, INC. is not subrogated to the priority rights of the United States Government, and it is further

ORDERED, that Claim No. 143 filed by TAUB, HUMMEL & SCHNALL, INC. is reclassified as a general claim and as so reclassified is allowed in the sum of $46,779.54. R. J.

Saunders & Co. v. Vincent 309 F.2d 65
(2 Cir 1962).

Dated: New York, April 19, 1973

s/ Edward J. Ryan
Referee in Bankruptcy

F I L E D

Apr 19 1973

Edward J. Ryan
Referee in Bankruptcy

APPENDIX IV

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
NEW YORK, N.Y.

August 4, 1972

Refer to
00/DARC(C&V)

REGION II INFORMATIONAL PIPELINE NO. 28

TO : CUSTOMS BROKERS, IMPORTERS, CUSTOMS EMPLOYEES AND OTHERS CONCERNED.
SUBJECT: Failure to file timely entry for merchandise released under Immediate Delivery Procedures.

To avoid any misunderstandings regarding claims for liquidated damages incurred for failure to file formal entry and deposit estimated duties within ten days after release of merchandise under immediate delivery procedures, the following is furnished for your information.

Section 172.22, of the Customs Regulations, provides as follows:

> "(1) If he is satisfied that the delay was not deliberate the district director may cancel such liquidated damages upon the payment of an appropriate sum which shall not exceed 10 percent of the duty assessed but not less than $25. In general, the district director shall not cancel a claim for liquidated damages upon payment of an amount in the lower range of his discretion if the entry is late by more than 3 working days. In determining the appropriate amount the district director shall take into consideration the following:

(i) the circumstances causing the delay;
(ii) the extent of the lateness;
(iii) the amount of duty involved; and
(iv) the past record of the importer with respect to the timeliness of filing entries."

Section 8.59(j) gives the Area Director the right to deny immediate delivery privileges to any importer or broker who repeatedly files entries untimely.

APPENDIX V

The Customs Broker

by Leonard M. Shayne

(The author is a licensed broker, President of Leading Forwarders, Inc., in New York, and President of the National Customs Brokers & Forwarders Association of America, Inc. He wrote this article at the editor's request.)

A Customhouse broker is an individual or company licensed by the Treasury Department under Sec. 641 of the Tariff Act to render service to importers and exporters.

For over 100 years, Customhouse brokers have been performing and expanding this role. Thus, legislation recently sponsored by Treasury recommended that the name be changed from "Customhouse broker" to "Customs broker," "to reflect the changing character of the industry; brokers no longer conduct business exclusively from offices at Customhouses, but now deal with Customs wherever imported cargo is handled."

There are about 3,000 individually licensed Customs brokers. Each is an American citizen who has passed an examination to prove his competence and fitness. Whatever their formal education may be, most have learned what they know largely through apprenticeship.

Most brokers do not practice as individuals, but are officers, partners or employees of companies which act as Customs brokers. Some of these companies have branches in many ports. Some Customs brokerage operations are divisions of large transport companies.

Generally, however, the average Customs brokerage firm is small, consisting of about 10 employees. The turnover of these employees is low, and, as in the Customs Service itself, involvement with the intricacies, and perhaps the romance, of trade tends to capture the individual for life.

Most firms also perform other services which have little to do with Customs. For example, they may be export ocean freight forwarders, and as such, licensed by the Federal Maritime Commission. They may handle air freight exports by acting as air freight sales agents for airlines.

Some are international air freight consolidators who, under Civil Aeronautics Board authorization, act as indirect carriers for the air transport of goods. Some are rail or truck forwarders under Interstate Commerce Commission jurisdiction.

These are the major and more common activities. In addition, depending upon the local circumstances, brokers may also be insurance brokers, local truckmen, warehousemen, packers, coopers, weighers, vessel agents, carriers' agents, travel agents, messenger services, and much more.

In addition to serving importers, Customs brokers also perform valuable services for the Customs Service. The most obvious benefit to the Service derives from the fact that most importers use Customs brokers. Thus, the people in the Customs Service have to deal with fewer people in the public sector.

If there were no Customs brokers, the Service might have to deal with 100-times as many individual importers. The administrative burden of coping with increased phone calls, mail and personal visits, would undoubtedly be beyond the capacity of the Service's facilities or personnel.

There are many ways unseen by Customs that brokers relieve the Service of burdensome demands from the public. There are countless prospective importers, and prospective exporters to the United States, who call upon brokers to give them information on how to import and how to clear an imported item through Customs.

As brokers know, the clearance through Customs of a particular import may involve far more than is apparent to the prospective importer. In fact, some of the most important questions on this subject are often those which he doesn't ask.

He usually will want to know the rate of duty—but he may not know that some physical characteristic of the item or some other factor may change that rate substantially. These may or may not be called to his attention when he directs his questions to someone in the Service who may not realize the extent of his ignorance.

The problems of valuation for duty assessment purposes as well as the existence of such impediments as quotas, dumping duties, licensing, trade mark restrictions, Department of Agriculture controls, special marking requirements and other considerations may not be anticipated by the novice importer. It is rare that he knows how to get this information directly, authoritatively and all from one source in the Service, and if he does, the tax on the patience, the knowledge, and the time of the official involved must be enormous.

In any event, the Customs broker supplements this activity of the Customs Service, and adds advice and information about new restrictions which are not yet in effect but might be applicable at the time of importation. In a nutshell, the amount of information dispensed by Customs brokers to new importers has such a character that the Service could not easily dispense it and a volume beyond estimate.

Information and advice of a similar character, but at a different level of expertise, is supplied by brokers to experienced importers. At times the broker may know and supply the answers. But, sometimes the broker's most valuable contribution to both the importer and the Service is to direct the importer to the right Customs official. In other instances, he may refer the inquirer to another Government agency altogether, or to an attorney who specializes in the matter.

The "recognition of important problems" is unfortunately not a skill which can be tested in the written examination for a Customs broker's license. It is one acquired only in the hard school of experience. But the ability to analyze a problem, and knowledge of where to go for the answers, make up the hallmark of the good Customs broker.

Part of the broker's time is spent as interpreter - yes, interpreting to importers the "officialese" of directives, regulations and laws. It all may be perfectly clear to those who live with it every day (although I doubt it), but it isn't so clear to the public; so, the broker has to translate for his clients.

A case in point was the recent dollar devaluation. It would be interesting to know how many man-hours Customs officials gave to importers and to brokers explaining the implications of the devaluation - and how many hundreds of times as many man-hours brokers and attorneys have spent explaining to importers what the Customs officials meant.

No offense intended! It is just a very technical subject. Besides, emotions get involved when the unexpected hits us, and not the least of the Customs broker's job is to tame the tigers on both sides of the forest.

Obviously, in order to do his job well, the broker must know how the Customs Service is organized, what makes it tick, and who does what job. And if he wants cooperation, he must know how to give it. The result is that brokers do many things to facilitate the jobs of individual Customs employees.

Members of the Customs Service find the chief evidence of the broker's existence in the Customs documents which the brokers prepare. And some, like some members of the public, think of brokers as "form fillers." That is a misconception.

Brokers devote less than 50 percent of their time and effort, in most Customs brokerage businesses to the actual

preparation and handling of Customs documents. They spend many man-hours dealing with importers, banks, air lines, steamship companies, truckmen, railroads, and others involved in the trade process, who have their own requirements and in fact, their own language and their own mystique.

Brokers give a substantial amount of their time to obtaining and receiving documents so that shipments can be cleared. Often they provide much assistance to help importers route their shipments via the best ways.

This may involve recommending foreign forwarders in many areas of the world to handle the shipping details and documentation for export from these countries to the United States.

Brokers may arrange temporary warehousing abroad, or assembly of goods from many sources of supply, or consolidation with shipments of other importers to save costs. Then, of course, there would be the need to deconsolidate both documents and freight upon arrival in the U.S.A.

Brokers also help importers choose carriers. This is a complicated problem involving many considerations of timing and costs, and it requires the analysis of much data to which shipper, foreign forwarder, carrier, Customs broker, and importer may all contribute their expertise.

For some products, it means deciding first whether to ship via air or vessel, and via what ports. Then, the decision may lie between containerization or not. The next choice may be whether to use one line rather than another, etc. These decisions are constantly being made and reviewed

There are other details of planning for an import which the broker may give advice about, or actually arrange. These include estimates of landed cost; payment for goods through draft, C.O.D., or letter of credit; insurance; redelivery of cargo from U.S. point of arrival to destination; warehousing in the U.S.; distribution in the U.S.; and many other services which an importer may not wish to perform for himself.

Customs clearance forms are but pieces of paper, a means to an end. The end is, of course, compliance with the laws of the United States governing the goods tendered for admission to the nation's commerce.

Obviously, the broker cannot properly complete the forms unless he knows those laws and knows what procedures must be followed in order to comply.

Considering the vast complex of laws affecting various imports, it is a hard task for Customs, dividing its responsibilities among many experts, to keep abreast of things. But think of the burden on the small firm of Customs brokers which is expected to know so much about every item it handles!

When the broker deals with the Customs import specialist, he is expected to know all about the classification problems of every item in every entry he presents, about all the factors affecting the appraisement, about exchange rates, and about all the rules affecting the way the duty is then calculated.

When he deals with administrative officials, he is expected to be an expert on bonds, and on powers of attorney, and on other highly technical problems, as well as to be aware of all the special requirements of law for all the different kinds of merchandise he may handle.

When he deals with the Customs inspector, he is expected to know all about cargo handling problems. And when he deals with other agencies of the Government, it is expected by them that he will have the same expertise in their realm.

Retired Customs employees who go to work for brokers are uniformly amazed at how much a broker has to know and to do. For, no import transaction is "home free" until the broker has done what the Customs Service accepts as a perfect job, and until the carrier and the importer also judge it to be perfect.

There are still other tasks to which the broker devotes the rest of his energies. There is the matter of arranging for the release of the goods by the import carrier. This may involve the surrender to it of an original bill of lading, and sometimes the disbursement of freight. There may be demurrage charges to pay if the Customs clearance wasn't effected, and the goods were not physically taken from the import carrier, within the free time.

Incidently, the broker may be taken to task for this occurrence, although it may not be his fault at all. For example, documents needed for clearance are not received in time because de-

layed in the mail; documents presented to Customs are delayed in approval; documents otherwise approvable have been lost en route, or at the terminal; or goods are not picked up from the import carrier because of congestion or lack of facilities.

If the broker is forced to pay for the demurrage out of his own pocket, the cost may well exceed his fees for the Customs clearance. The final calamity occurs if the goods are sent to General Order for any of the foregoing reasons.

Things being as they are with cargo and with the human beings who handle it, there are claims and counterclaims for shortages, damages, delays, mishaps, and whatnot among the daily chores of every Customs broker. It is when these things happen to cargo or documents that the broker learns what the name "broker" really means.

The broker is the "middle man" who, working with all parties to a transaction, tries to bring them together, to keep order, to keep things moving, to minimize losses, to satisfy everybody, and to keep his head and his reputation so that he will still be around to handle the next crisis when it comes along tomorrow. □

APPENDIX VI

THE OPINION AND ORDER OF REFEREE IN BANKRUPTCY - ROY BABITT FILED FEBRUARY 14, 1967 - MATTER OF FASTLINE, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

FASTLINE, INC.,

Debtor.

In Proceedings for An Arrangement No. 65 B 872

APPEARANCES:

MILLARD A. RING, ESQ.
Attorney for Creditor
Freeslate International Corp.
11 Broadway
New York, New York

LEVIN & WEINTRAUB, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York

ROY BABITT, Referee:

On the debtor's objection to claim #18 interposed by Freeslate International Corp., this court rendered an

opinion on October 7, 1966 sustaining the objection. Prior to the entry of an order on that opinion, Freeslate moved for what it termed reargument but since no order had been entered, may more aptly be considered a motion for the court to withdraw its prior opinion in the light of facts which were not available to the court when it first decided the merits of the disputed claim.

The additional facts which Freeslate urges should support a result contrary to the one the court reached are not disputed and are as follows: That the debtor, Fastline, Inc. was both the nominal consignee and the actual importer of record and that the bond furnished in connection with the import transaction was the bond of the debtor with itself as principal. As the facts were made clear to the court when the matter was first heard, it appeared that the customs broker -- Freeslate International Corp. -- may have been primarily responsible for payments of duties and was paying its own obligation. Freeslate now urges that this is not the case and its acknowledgment of the newly offered facts, the debtor, not disputing them, insists that the result should nevertheless be the same.

In my view, these added facts defeat the objection to the claim with the result that the court will modify its prior opinion as provided herein.

In the Chemo Puro Manufacturing Corp. case, sub non. R. J. Saunders & Co., Inc. v. Vincent, Trustee of Chemo Puro Manufacturing Corp., 309 F.2d 65 (2d Cir. 1962), emphasis was placed on the fact that the customs broker there could not succeed to the rights of the United States including

the right to have the payment on customs duties considered a priority claim. As seen by the Court of Appeals, the question was whether the one who paid the customs duties was paying its own debt or that of the debtor. The court noted that under the Tariff Act, 1930 U.S.C.§1483, a nominal consignee is to be treated as the owner of the merchandise and that by furnishing a bond to expedite entry of the merchandise, the customs broker undertook liability for the duties which it paid. The court noted that the broker could have escaped liability by designating the true owner of the merchandise (the debtor) and having the debtor post the bond. The court concluded that on the facts in the case the customs broker, principal on the bond and nominal consignee was discharging its own debt.

In the facts here, it appears that the debtor was the owner of the merchandise and was the principal on the bond. Thus, when Freeslate paid the claim, the government was receiving payment not from the primary obligor on the bond but from a volunteer in the business of expediting release of merchandise for those who had sought such services at the port of entry. What seems clear is that Freeslate was merely acting under some broad power conferred by the debtor to take all necessary steps to obtain the prompt release of the merchandise.

The court is mindful, to be sure, of the fact that Congress has permitted subrogated priority in only one statutory instance -- that in which a surety on a bond given to the United States discharges the duty on behalf of the principal. See 31 U.S.C.§193. But that section indicates

that it is applicable where the principal is insolvent or deceased. In the case at bar it appears clearly that the merchandise was released to the debtor and payment made approximately two months before the filing of the petition for the arrangement. Hence it is unnecessary to consider whether or not the term insolvent carried in 31 US.C.§193 is used in the bankruptcy sense or in some other sense.

This is a court of equity as we have been reminded again and again. See Bank of Marin v. England, Trustee in Bankruptcy -- U.S. -- (No. 63, October Term, 1966; November 21, 1966), noting " . . . an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." In application of equitable principles to a case in which a debtor has not been liquidated in bankruptcy but has proceeded to continue its affairs as a rehabilitated arrangement debtor, it seems to me that one who performs services for it, even of the character in this case, should not be put in the class of general creditor. Consequently, I reject the objection to the claim as a priority claim and therefore, I deny the motion whereby debtor asks that the $450 which is the amount of the claim be reclassified as a general claim.

So ordered.

Dated: New York, New York
February 14, 1967

s/ Roy Babitt
Referee in Bankruptcy

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-129

TAUB, HUMMEL & SCHNALL, INC.,
Petitioner-Appellant,

—against—

I. C. HERMAN & CO., INC.,
Respondent-Appellee.

RESPONDENT-APPELLEE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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October Term, 1974

No. 74-129

TAUB, HUMMEL & SCHNALL, INC.,
Petitioner-Appellant,

—against—

I. C. HERMAN & CO., INC.,
Respondent-Appellee.

RESPONDENT-APPELLEE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

1. Does the voluntary payment by a customs broker of United States customs duties owed by an importer subrogate the broker to the priority claim status, if any, that the United States Government might have had against the importer in the importer's subsequent Chapter XI proceeding had such payment not been made?

2. Can subrogated priority tax claim status in connection with customs duties paid prior to the institution of a Chapter XI proceeding be allowed in that proceeding if not "due and owing" at the time the Chapter XI petition is filed?

3. Can customs duties paid prior to the institution of a Chapter XI proceeding be properly classified as taxes "due and owing" on the date the Chapter XI petition is filed?

Reasons For Not Granting Writ

Congress did not see fit to include customs brokers who pay their clients' customs duties in the priority categories established by 31 U.S.C. § 193 and 11 U.S.C. § 104a. Therefore, regardless of their importance to the economy, and it is doubtful that their function is more important than unsecured trade creditors whose money is used to discharge tax and other forms of priority indebtedness, customs brokers are simply not entitled to, and should not be entitled to, subrogated priority status. If they were, then anyone who advanced money to an insolvent debtor to pay priority wage or tax claims would be entitled to such status, a result clearly not contemplated by the two statutes in question. The fact that customs brokers advance money to importers by paying the Government directly instead of advancing the money to the importer for transmission to the Government should not, and does not, change the result.

As far as Respondent-Appellee ("Herman") can determine, only one Court of Appeals decision has been rendered dealing with the inter-relationship between the two statutes in question. With all the bankruptcies that take place each year, and with customs duties allegedly aggregating over $4 billion annually, and with over three thousand customs brokers plying their trade, it is obvious that the issue of subrogated priority is raised infrequently at best. This infrequency also establishes the relative unimportance of the issues presented by Petitioner-Appellant ("Taub"). Moreover, it establishes that the parade of imaginary horribles allegedly resulting from the decision of the Court

below are nothing more than Alice in Wonderland fairy tales dredged up to convince this Court of the importance of what is in fact a very insignificant matter.

Disregarding the self-serving declarations made in Taub's petition, the fact that Taub has failed to make any showing that the decision in the Court below (a) will have a far-reaching effect on the Treasury Department or upon the entry of cargo into our country, or (b) will have any adverse effect on the public policy of the United States or the administration of its bankruptcy and customs laws, or (c) places an undue burden on the prompt collection of customs duties and the expeditious entry of goods. Moreover, on the question of violence to general equitable principles, it is respectfully suggested that violence to equitable principles would occur if the decision in the Court below were otherwise, *i.e.*, insolvent estates would be depleted to the detriment of unsecured creditors.

Without conceding that customs brokers are precluded from becoming sureties on customs bonds,[1] there is nothing to prevent such brokers from insisting that their clients execute surety company bonds as principals and then upon paying the customs duties, accepting an assignment of the surety company's rights. This procedure would give customs brokers the protection Taub is so worried about, since 31 U.S.C. § 193 specifically accords subrogated priority protection to the assignees of sureties. Or, alternatively, if customs brokers are really interested in protecting themselves, they can do what other creditors do—evaluate their client's credit standing carefully and/or refuse to extend credit and have their clients pay the customs duties themselves.

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[1] The regulations cited in Taub's petition relate to companies permitted to write customs bonds. Nothing cited in the petition indicates that a customs broker is precluded from becoming a co-surety on a customs bond. It is doubtful that the Government would complain about having an additional responsible party added to the bond.

While the Court of Appeals did not deal with the issue of whether subrogated priority status should be accorded to customs duties paid prior to the institution of a Chapter XI proceeding, there is a further reason why subrogated priority status is not available to customs brokers in the situation under discussion, *viz.*, the payment of import duties by a customs broker prior to the institution of a Chapter XI proceeding makes them duties that were *not* "due and owing" on the date the proceedings were instituted. Thus, since Section 64(a)(4) of the Bankruptcy Act (11 U.S.C. § 104(a)(4)) accords priority tax status only to taxes which are "due and owing" on the date the proceedings are instituted, the fact that the taxes are already paid takes them out of the priority category.

The decision in the Court below correctly relies on 31 U.S.C. § 193 and the rationale in *Saunders Co.* v. *Vincent*, 309 F.2d 65 (2d Cir. 1962), in which the Court held:

> "Congress has seen fit to grant subrogated priority in only a single specific instance, that of a surety making payment to the United States on a bond given to the United States.
>
> * * * * *
>
> The fact that Congress has chosen to single out a narrow class, that of sureties on bonds given to the United States, for special treatment gives rise to the strong implication that it meant to limit this priority solely to the class enumerated and withhold it from all other classes of creditors. The general equity power of federal courts is clearly superseded by and must be confined within the Bankruptcy Act and related statutes. Neither the Bankruptcy Act nor any statutes dealing with bankruptcy can be interpreted as creating the rights of subrogation and priority in a case such as this." (at p. 142)

CONCLUSION

For the foregoing reasons, the Petition for Certiorari filed by Taub, Hummel & Schnall, Inc. should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.
OCT 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-129

TAUB, HUMMEL & SCHNALL, INC.,

Petitioner,

-against-

I. C. HERMAN & CO., INC.,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

(1)

We have read the respondent-appellee's brief in opposition to our petition for a writ of certiorari and believe that our petition speaks for itself. We

did not wish to burden this Court with further argument.

However,

The respondent-appellee's brief contains a number of incorrect statements which compel us to reply.

(2)

We assure this Court that the effect of an adverse decision on this application is very real to brokers, importers and the Customs service. In fact, the National Customs Brokers & Forwarders Association of America Inc. has already contacted this office about the submission of a brief as amicus curiae should this petition be granted. Similarly the United States Treasury, Bureau of Customs is expected to file a brief in support of our position.

The respondent-appellee in a cavalier fashion seeks to defeat our application by concluding that the issue is unimportant because it arose so infrequently. While we reject such a statement as inaccurate, and we can catalog all of the cases in which such issue arose or is pending if this Court desires, we submit that the importance of the issue cannot be measured by the number of lawsuits. There are now pending similar matters awaiting the results of this case.

The most flagrant inaccuracies occur in the statements contained in the last paragraph on page 3.

Respondent urges that brokers are not prevented from becoming co-sureties on customs bonds. Respondent has not taken the trouble to read the Regulations and Treasury decision we cite, both of which are clear and definite and prohibit such action. If corporate brokers are prohibited from becoming sureties such prohibition applies to co-sureties as well.

Respondent suggests assignment from the surety as a solution. This is never done in the industry. The surety companies never assign their rights because they continue to be bound to the government since the bond is on-going, and they would be jeopardizing their rights as to future demands by the government on the bonds.

Respondent further suggests that assignments are recognized under 31 U.S.C. 193 dealing with subrogation in favor of sureties. This suggestion overlooks two problems; the first - 31 U.S.C. 193 does not apply as we have argued in our petition; the second - the statute in speaking of assignee was referring to successor sureties, not third party assignees.

Respondent admonishes the custom brokers to deal only with financially sound importers. Such argument merely begs the issue. In fact the importer in this case was outwardly sound on Friday and bankrupt on Monday. Furthermore, consider what would happen in business and industry if only AAA accounts were served.

(3)

On page 4 respondent argues that 11 U.S.C.A. 104(a)(4) only accords priority to taxes "due and owing". While we do not concede that the words "due and owing" are the criteria, had respondent read further, the following subsection (5) would demolish respondent's argument.

The respondent overlooks our contention that petitioner is entitled to equitable subrogation.

CONCLUSION

FOR ALL THE REASONS STATED IN THE PETITION AND HEREIN A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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